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Attorneys for Defendant
**THE BURLINGTON INSURANCE
COMPANY (erroneously sued as
Burlington Insurance Company)**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JENNY WOLFES,

Plaintiffs,

vs.

BURLINGTON INSURANCE
COMPANY AND DOES 1 to 25,
inclusive,

Defendants.

CASE NO. C07 04657 JW

**DEFENDANT THE BURLINGTON
INSURANCE COMPANY'S
REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF ITS
MOTION TO DISMISS**

Date: January 28, 2008
Time: 9:00 a.m.
Ctm: 8

*[Filed Concurrently with Burlington's
Notice of Motion and Motion to
Dismiss]*

TO PLAINTIFF AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendant The Burlington Insurance
Company requests that the Court take judicial notice of the following documents:

1. A true and correct copy of the Verified Complaint filed by Big Sky
Entertainment III, Inc., James Edward Pope, William G. Leunis III
and Robert Simpson against Jenny Wolfes in Santa Clara County

1 Superior Court, Case No. 104CV02529, is attached hereto as Exhibit
2 No. 1;

3
4 2. A true and correct copy of the Complaint filed by Plaintiff Jenny
5 Wolfes, Case No. 106CV075899 RMW is attached hereto as Exhibit
6 No. 2; (which is now part of Case No. C0700696 RMW)

7
8 3. A true and correct copy of Burlington's Answer to the Complaint is
9 attached hereto as Exhibit No. 3;

10
11 4. A true and correct copy of Burlington's Notice of Pre-Trial Dates and
12 Procedures as Exhibit No. 4; and,

13
14 5. A true and correct copy of the second Complaint filed by Plaintiff
15 Jenny Wolfes against Burlington, Case No. C07 04657 PVT, is
16 attached hereto as Exhibit No. 5.

17
18 Dated: November 7, 2007

WESTON & McELVAIN LLP

19
20
21 By: 

Richard C. Weston

Richard C. Rey II

22 Attorneys for Defendant THE
23 BURLINGTON INSURANCE COMPANY
24
25
26
27
28

EXHIBIT 1

MARC L. SHEA, ESQ., State Bar No. 087712
POPELKA + ALLARD, A.P.C.
160 W. Santa Clara Street, 12th Floor
San Jose, CA 95113-1733
[408] 298-6611 Telephone
[408] 275-0814 Facsimile

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

BIG SKY ENTERTAINMENT III, INC.,
individually and dba The Blue Tattoo, JAMES
EDWARD POPE, WILLIAM G. LEUNIS III,
ROBERT SIMPSON,

Plaintiffs,

v.

JENNY WOLFES, and DOES 1-20, inclusive,

Defendants

No.

VERIFIED COMPLAINT FOR
INJUNCTION; CONVERSION;
BREACH OF FIDUCIARY DUTY;
INTERFERENCE WITH
PROSPECTIVE ECONOMIC
ADVANTAGE

Amount Demanded Exceeds
\$25,000

Plaintiffs allege as follows:

1. Plaintiff BIG SKY ENTERTAINMENT III, INC. (the "company" or "Big Sky") is a California corporation doing business in Santa Clara County, State of California. Plaintiff has complied with the fictitious business name laws of California and does business in Santa Clara County as The Blue Tattoo, a bar/restaurant generally located at 170 W. St. John (the corner of W. St. John and San Pedro streets), San Jose (the "property").

2. Plaintiff JAMES EDWARD POPE (hereinafter "POPE") is a shareholder of Big Sky and owns 50 shares representing an ownership interest in the company of approximately twenty-four and seven tenths percent (24.7%).

3. Plaintiff WILLIAM G. LEUNIS III (hereinafter "LEUNIS") is a shareholder of Big Sky and owns 69 shares representing an ownership interest in the company of thirty-four and

two-tenths percent (34.2%). LEUNIS is also one of the major creditors of the company, being owed in excess of two hundred and sixty thousand dollars (\$260,000.00)

4. Plaintiff ROBERT SIMPSON (hereinafter "SIMPSON") is a shareholder of Big Sky and owns approximately 25 shares representing an ownership interest in the company of twelve and four-tenths percent (12.4%).

5. Defendant JENNY WOLFES (hereinafter "WOLFES" is a shareholder of Big Sky and is the holder of approximately 50 shares representing an ownership interest in the company of approximately twenty-four and seven tenths percent (24.7%).

6. Shareholders FRANK and THERSE AMMIRO (hereinafter "AMMIRO") are shareholders of Big Sky and are the holders of 8 shares representing ownership interest in the company of approximately four percent (4%).

7. The directors of Big Sky are POPE, LEUNIS, SIMPSON and WOLFES.

8. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 20, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges, that each of the fictitiously-named defendants is legally responsible in some manner for the occurrences herein alleged, and that the damages as herein alleged were proximately caused by those defendants.

FACTUAL BACKGROUND

9. Big Sky has struggled financially. It lost money in 2003 and is losing money in 2004. It is insolvent as its debts exceed its assets and as it is unable to pay its bills as they become due. The directors of the company have been tried to determine the best course for the company.

10. On or about May 31, 2004, defendant Wolfes took over fourteen thousand eight hundred dollars (\$14,800.00) from the cash assets of the company, without consulting, and without the approval of, any other director or officer of the company. As a result, the company was unable to make payment towards its obligations on the lease of the property. Despite repeated demands that she return the money to the company, defendant Wolfes has failed and refused to return the monies.

\\

1 11. In June, 2004, while Wolfes was acting as the operating manager of the
2 bar/restaurant, the company was burglarized on at least two occasions, and property having a value
3 of at least thirty thousand dollars (\$30,000.00) was stolen.

4 12. At a board of directors' meeting held on June 30, 2004, the directors discussed
5 marketing the company for sale.

6 13. In or about late June, 2004, the company received information that defendant
7 Wolfes had reported to the California Department of Alcoholic Beverage Control, to the California
8 Employment Development Department, and to other state and local agencies, that: (a) she was no
9 longer involved with the company, and (b) that the company was allegedly not in compliance with
10 certain regulations and laws. Plaintiffs have demanded that defendant Wolfes provide copies of the
11 letters she sent to such state and local agencies, but defendant Wolfes has not done so.

12 14. On July 8, 2004, the company entered into a Management Agreement with a third
13 party to run the restaurant at the property. Thereafter, the third party expressed an interest in
14 buying the assets of the company. Plaintiff POPE reported that the third party's interest to the
15 other directors. Directors POPE, LEUNIS and SIMPSON were, and are, in favor of selling
16 company assets to the third party (also "buyers"). Defendant Wolfes, however, was and is not.

17 15. On or about July 15, 2004, and at various times since then, WOLFES said to
18 LEUNIS that she would do everything in her power to stop the sale of the assets of the company to
19 the buyers.

20 16. On July 15, 2004, notice of a meeting of directors, shareholders, and creditors was
21 sent out and on July 19, 2004, a meeting of the directors was started. Plaintiff, and director Ed
22 Pope, announced that the buyers might be willing to purchase the company's assets for between
23 \$300,000 and \$350,000. All directors were in favor of pursuing that opportunity except for
24 defendant Wolfes, who voiced her opposition. At the continued meeting, the directors voted to
25 terminate, without cause, defendant Wolfes' position as an officer and employee of the company.
26 Accordingly, her only remaining relationship with the company is as a shareholder and director of
27 the company.

28 17. On July 20, 2004, plaintiff LEUNIS participated in a telephone conversation with
WOLFES concerning the company. Defendant Wolfes said she opposed the proposed sale, and

1 vowed to stop the transaction.

2 18. On or about July 21, 2004, plaintiffs heard from reliable sources that Wolfes had
3 made telephone calls to interfere with the sales transaction. That evening, the buyers gave notice
4 that they wanted to back out of the purchase of assets, and the company had to make significant
5 concessions to the buyers to keep them interested.

6 19 On July 21, 2004, notice of a meeting of directors, shareholders, and creditors was
7 sent out and on July 23, 2004, a meeting of the directors was started. A majority of the directors
8 passed a resolution to sell most of the company's assets to the buyers on certain terms and
9 conditions.

10 20. The shareholder's meeting was held on August 2, 2004. All shareholders were
11 represented in person or by proxy. Of the 202 shares outstanding, 152 shares (just over 75%)
12 voted to sell the company's assets to the buyers. Wolfes did not vote her shares at the meeting, but
13 on August 4, 2004, gave notice that she voted her shares against the resolution.

14 21. Notwithstanding the decisions of the directors and shareholders to sell company
15 assets, Wolfes has continued to take actions which are disruptive of that sale. Plaintiffs have
16 spoken with employees of the company and with promoters who state that defendant Wolfes has
17 solicited them to stop working with the company. Defendant Wolfes has made accusations about
18 building at the property without knowing all the facts and without discussing the facts at directors'
19 meetings. She has made unauthorized contact with the San Jose Planning Commission, and other
20 state and local agencies, for the apparent purpose of interfering with the planned sale of assets to
21 the buyers. She has made demands to inspect corporate records at times when she knew the
22 director and Chief Financial Officer of the company was out of the area and when the company
23 could not possibly comply. Defendant's actions are not beneficial to the company and are in
24 breach of her fiduciary duties to the company, its shareholders and creditors.

25 22. On or about August 1, 2004, defendant Does 1 through 10, inclusive, and each of
26 them, stole company permits at the property and poured a bag of cement into the company's septic
27 system.

28 23. On or about August 12, 2004, Wolfes served on personnel at the company's
business premises a written demand to be allowed into the business premises. Wolfes had not

1 consulted with the company's other directors and officers regarding this request. This demand
2 appears to have been calculated to intimidate the buyers of the company, which is currently helping
3 remodel the business premises as part of the purchase of assets of the company.

4 24. These actions are disruptive to plaintiff's business and its plans to sell its assets to
5 the buyers. Plaintiffs are informed and believe and thereon state that unless Wolfes is enjoined and
6 restrained as hereafter pled, that plaintiffs may suffer irreparable injury including without
7 limitation the loss of its opportunity to sell its assets to the buyers.

8
9 FIRST CAUSE OF ACTION

10 [Injunctive Relief]

11 25. Plaintiffs incorporate herein by reference paragraphs 1 through 24 of this complaint
12 as though fully set forth herein.

13 26. Plaintiffs are informed and believe and thereon state that WOLFES will continue to
14 act to undermine and destroy the sale of the assets of the company to the buyers.

15 27. Plaintiffs have no adequate legal remedy to prevent WOLFES acting to interfere
16 with the contractual relations between Big Sky and the buyers of the assets.

17 28. Plaintiffs request injunctive relief enjoining WOLFES, and her agents, servants,
18 employees and representatives, and all persons acting in concert or participating with her, from:

19 (A) contacting the buyers of the assets of the company;

20 (B) Doing any act to interfere with, stop, or cause problems regarding the sale
21 of the assets of the company to the buyers;

22 (C) Doing any act affecting the company without first discussing that act with
23 the other company directors at a duly noticed directors' meeting, and
24 attempting to obtain written approval for that act, including without
25 limitation: (i) contacting the company's landlord; (ii) contacting creditors or
26 suppliers concerning the company; (iii) contacting governmental agencies
27 concerning the company; (iv) contacting employees of the company.

28 WHEREFORE, plaintiffs pray for relief as set forth herein.

SECOND CAUSE OF ACTION

[Conversion]

29. Plaintiffs incorporate herein by reference paragraphs 1 through 24 of this complaint as though fully set forth herein.

30. Defendants Wolfes and Does 1 through 20, inclusive, have converted the property of the company.

31. As a proximate result of said conversion, plaintiff company has been damaged in a sum not less than \$14,800.

WHEREFORE, plaintiffs pray for relief as set forth herein.

THIRD CAUSE OF ACTION

[Breach of Fiduciary Duty]

32. Plaintiffs incorporate herein by reference paragraphs 1 through 24 of this complaint as though fully set forth herein.

33. Defendants Wolfes and Does 1 through 20, inclusive, and each of them, have at all relevant times owed fiduciary duties to the company, the shareholders, and the creditors of the company to act in their best interest and with the utmost loyalty, good faith and fair dealing.

34. Defendants Wolfes and Does 1 through 20, inclusive, and each of them, have breached said fiduciary duties by taking the actions described herein to undermine the sale of company assets to the buyers.

35. As a proximate result of said breaches of fiduciary duties, plaintiffs have sustained damage, the nature and extent of which are unknown. Plaintiffs request leave of court to insert the true amount of said damages when the same becomes known.

WHEREFORE, plaintiffs pray for relief as set forth herein.

FOURTH CAUSE OF ACTION

[Interference with Prospective Economic Relations]

36. Plaintiffs incorporate herein by reference paragraphs 1 through 24 of this complaint as though fully set forth herein.

37. Defendants interfered with contractual relations and/or prospective contractual relations between Big Sky and the buyers.

38. As a direct and proximate result of defendants' actions, plaintiffs have been damaged in an amount to be shown and pray leave of this court to insert the true amount of said damages when same become known.

WHEREFORE, plaintiff prays for judgment as follows:

As to the First Cause of Action:

1. For injunctive relief enjoining WOLFES, and her agents, servants, employees and representatives, and all persons acting in concert or participating with her, from:

(A) contacting the buyers of the assets of the company;

(B) Doing any act to interfere with, stop, or cause problems regarding the sale of the assets of the company to the buyers;

(C) Doing any act affecting the company without first discussing that act with the other company directors at a duly noticed directors' meeting, and attempting to obtain written approval for that act, including without limitation: (i) contacting the company's landlord; (ii) contacting creditors or suppliers concerning the company; (iii) contacting governmental agencies concerning the company; (iv) contacting employees of the company.

2. For costs of suit;

3. For such other and further relief as the court may deem proper.

As to the Second through Fourth Causes of Action:

1. For damages in an amount according to proof;

2. For costs of suit;

3. For such other and further relief as the court may deem proper.

Dated: August 17, 2004

POPELKA + ALLARD, A.P.C.

By _____
MARC L. SHEA, ESQ.
Attorney for Plaintiffs

Y:\p\popelleunits v wolfes-deblasi\p\pds\injunction action\complaint rev3 wpd

EXHIBIT 2

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**

BURLINGTON INSURANCE COMPANY
and DOES 1 through 25, inclusive

YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTA DEMANDANDO EL DEMANDANTE):
JENNY WOLFES

06 DEC -6 AM 8:00

D. Kontorovsky

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DIAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:

(El nombre y dirección de la corte es):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 NORTH FIRST STREET
SAN JOSE, CA 95113

CASE NUMBER:
(Número de Caso)

106CV075899

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

DAVID KRAFT, ESQ. #83533

181 DEVINE STREET

SAN JOSE, CA 95110

DATE:

(Fecha) DEC 06 2006

Clerk, by

(Secretario)

D. Kontorovsky

Kiri Torre

Chief Executive Officer/Clerk

Deputy

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

NOTICE TO THE PERSON SERVED: You are served

- ☐ as an individual defendant.
- ☐ as the person sued under the fictitious name of (specify):

- ☒ on behalf of (specify): Burlington Insurance Company

under:

- ☒ CCP 416.10 (corporation)
- ☐ CCP 416.20 (defunct corporation)
- ☐ CCP 416.40 (association or partnership)
- ☐ other (specify):

- ☐ CCP 416.60 (minor)
- ☐ CCP 416.70 (conservatee)
- ☐ CCP 416.90 (authorized person)

- ☒ by personal delivery on (date):

DAVID KRAFT, #83533
Attorney at Law
181 Devine Street
San Jose, CA 95110
(408) 293-6193

Attorney for Plaintiff

THIRD DEPT FILED
06 DEC -6 AM 8:00

CLERK
OF CA.
SANTA CLARA
D. Kontorovsky

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

JENNY WOLFES,

Plaintiff,

vs.

BURLINGTON INSURANCE COMPANY)
AND DOES 1 to 25, Inclusive,)

Defendant.)

Case No.

106CV075899

COMPLAINT FOR DECLARATORY
RELIEF
[CCP § 1060]

Plaintiff alleges:

1. Jenny Wolfes ("Wolfes") is an individual and at all times relevant to this action, Brown was and is a resident of Santa Clara County, California.

2. Defendant Burlington Insurance Company (hereinafter Burlington) is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California and authorized to transact, and transacting, business as a commercial general liability insurer in the State of California.

3. Plaintiffs have no knowledge of the true names and capacities of Defendants sued herein as DOES 1 through 25, inclusive, except that Plaintiffs are informed and believe, and upon such information and belief allege, that each of the fictitiously named Defendants is

1 responsible in some manner for the occurrences alleged in this Complaint and/or is legally
2 responsible for the wrongful acts alleged herein. Plaintiffs therefore sue these Defendants by
3 such fictitious names and will amend this Complaint to allege their true names and capacities
4 when ascertained. Said DOE Defendants, and each of them, are collectively included in the
5 reference to Defendants.
6

7 4. Plaintiff is informed and believes, and upon such information and belief alleges,
8 that at all times herein mentioned each of the Defendants was the agent and employee of each
9 of the remaining Defendants, and in doing the things alleged below, was acting within the
10 scope of such agency, and that the Defendants have ratified their conduct.
11

12 5. On or about June 27, 2004, in Santa Clara County, Defendant Burlington for
13 valuable consideration issued a commercial general liability insurance policy, number
14 585BW03318, to Big Sky Entertainment III, Inc., hereinafter referred to as the "policy"
15 covering relevant periods during 2004.
16

17 6. Plaintiff Jenny Wolfes was at all times mentioned an officer, director, shareholder
18 and employee of Big Sky Entertainment III, Inc. Wolfes was at all times mentioned insured
19 under the policy.

20 7. On or about June 27, 2004 and while the policy was in full force and effect Wolfes
21 was served with a law suit filed in Santa Clara County Superior Court, Number
22 104CV025291 entitled Big Sky Entertainment, III, Inc., individually and dba The Blue Tattoo,
23 James Edward Pope, William G. Leunis III, Robert Simpson vs. Jenny Wolfes. On September
24 20, 2005 Wolfes was served with a First Amended Cross-Complaint filed in the same action
25 entitled William G. Leunis III vs. Jenny Wolfes. On October 20, 2006 Wolfes was served with
26
27
28

1 the Second Amended Cross-Complaint filed in the same action entitled William G. Leunis III
2
3 vs. Jenny Wolfes

4 8. On October 20, 2005, July 18, 2006, and November 13, 2006 Wolfes tendered to
5 Burlington the complaint and cross-complaint and demanded that pursuant to the policy,
6 Burlington provide a defense on behalf of Wolfes and indemnify her with respect to the
7 complaint and cross-complaint.

8 9. Burlington has refused and continues to refuse to provide a defense to Wolfes for
9 the defense of the complaint and cross-complaint herein mentioned. Burlington has refused
10 and continues to refuse to indemnify to Wolfes for the complaint and cross-complaint herein
11 mentioned.

12 10. An actual controversy has arisen between the parties with respect to the rights and
13 duties of each under the terms of the policy. Wolfes contends that Burlington is contractually
14 bound by the terms of the policy to provide her with a defense with respect to the complaint
15 and cross-complaint and to indemnify her with respect to the complaint and cross-complaint.

16 11. Defendant Burlington contends, and Plaintiff disputes, that Wolfes was not an
17 insured, that if she was an insured the alleged acts in the complaint and cross-complaint were
18 not done by her as an officer, director or employee of Big Sky Entertainment, III and that the
19 policy does not provide for coverage for the causes of action alleged in the complaint and
20 cross-complaint.

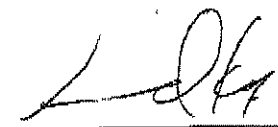
21 12. Plaintiff desires a judicial determination of her rights under the policy and a
22 declaration as to which party's contention is correct.

13. A judicial declaration is necessary and appropriate at this time under the circumstances herein described in order that the parties may ascertain their respective rights and duties under the policy.

Wherefore, Plaintiff prays judgment:

1. Declaring that Plaintiff Wolfes was an insured under the policy;
2. That acts alleged in the complaint or cross-complaint done by Wolfes as an officer, director or employee of Big Sky Entertainment, III, Inc.
3. That Burlington is contractually obligated under the policy to provide a defense for Plaintiff and or indemnify Plaintiff as to the complaint and cross-complaint.
4. For Plaintiff attorney fees and costs incurred in the defense of the complaint and cross-complaint.
6. For the costs of the suit herein incurred; and
7. For such other and further relief as the court may deem proper.

Dated: 12-5-07



DAVID KRAFT
Attorney for Plaintiff
JENNY WOLFES

106CV075899

CIVIL LAWSUIT NOTICE

CASE NUMBER: _____

Superior Court of California, County of Santa Clara
191 N. First St., San Jose, CA 95113

READ THIS ENTIRE FORM

PLAINTIFFS (the person(s) suing): Within 60 days after filing the lawsuit, you must serve each defendant with the Complaint, Summons, an Alternative Dispute Resolution (ADR) Information Sheet, and a copy of this Civil Lawsuit Notice, and you must file written proof of such service.

DEFENDANTS (the person(s) being sued): You must do each of the following to protect your rights:

1. You must file a written response to the Complaint, in the clerk's office of the Court, within 30 days of the date the Summons and Complaint were served on you;
2. You must send a copy of your written response to the plaintiff; and
3. You must attend the first Case Management Conference.

Warning: If you do not do these three things, you may automatically lose this case.

RULES AND FORMS: You must follow the California Rules of Court (CRC) and the Santa Clara County Superior Court Local Civil Rules and use proper forms. You can get legal information, view the rules and get forms, free of charge, from the Self-Service Center at 99 Notre Dame Avenue, San Jose (408-882-2900 x-2926), or from:

- State Rules and Judicial Council Forms: www.courtinfo.ca.gov/forms and www.courtinfo.ca.gov/rules
- Local Rules and Forms: www.sccsuperiorcourt.org/civil/rule1toc.htm
- Rose Printing, 39 N. First St., San Jose (408-293-8177)

For other local information, visit the Court's Self-Service website www.sccselfservice.org and select "Civil."

CASE MANAGEMENT CONFERENCE (CMC): You must meet with the other parties and discuss the case, in person or by telephone, at least 30 calendar days before the CMC. You must also fill out, file and serve a Case Management Statement (Judicial Council form CM-110) at least 15 calendar days before the CMC. You or your attorney must appear at the CMC. You may ask to appear by telephone – see Local Civil Rule 8.

Your Case Management Judge is: Honorable Kevin McKenney DEPT: 16

The first CMC is scheduled as follows: (Completed by Clerk of Court)

Date: APR 17 2007 Time: 2:15 PM Dept.: 16

The next CMC is scheduled as follows: (Completed by party if the first CMC was continued or has passed)

Date: _____ Time: _____ Dept.: _____

ALTERNATIVE DISPUTE RESOLUTION (ADR): If all parties have appeared and filed a completed ADR Stipulation Form (local form CV-5008) at least 15 days before the CMC, the Court will cancel the CMC and mail notice of an ADR Status Conference. Visit the Court's website at www.sccsuperiorcourt.org/civil/ADR/ or call the ADR Administrator (408-882-2100 x-2530) for a list of ADR providers and their qualifications, services, and fees.

WARNING: Sanctions may be imposed if you do not follow the California Rules of Court or the Local Rules of Court.

EXHIBIT 3

COPY

WESTON & McELVAIN LLP
RICHARD C. WESTON, Bar #126491
RICHARD C. REY II, Bar #193212
888 West Sixth Street, 15th Floor
Los Angeles, California 90017
Telephone: (213) 596-8000
Facsimile: (213) 596-8039
E-mail: rweston@wmattorneys.com
rrey@wmattorneys.com

Attorneys for Defendant
THE BURLINGTON INSURANCE COMPANY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JENNY WOLFES,

Plaintiffs,

vs.

BURLINGTON INSURANCE
COMPANY AND DOES 1 to 25,
Inclusive,

Defendants.

CASE NO. C07 00696 RMW (PVTx)

**THE BURLINGTON INSURANCE
COMPANY'S ANSWER TO
COMPLAINT**

Defendant THE BURLINGTON INSURANCE COMPANY, erroneously
sued as BURLINGTON INSURANCE COMPANY, ("Defendant") hereby
answers and responds to the allegations of the Complaint (the "Complaint"), filed
by Plaintiff Jenny Wolfes ("Plaintiff"), as follows:

1. Answering the allegation of paragraph 1 of the Complaint, Defendant
lacks sufficient information to admit or deny the allegation and, therefore,
Defendant denies it.

Exhibit 3 Page 16

2. Answering the allegations of paragraph 2 of the Complaint, Defendant admits that is authorized to do transact business as a commercial general liability insurer in the State of California. Defendant denies all remaining allegations.

3. Answering the allegation of paragraph 3 o of the Complaint, Defendant lacks sufficient information to admit or deny the allegations and, therefore, Defendant denies them.

4. Answering the allegations of paragraph 4 of the Complaint, Defendant lacks sufficient information to admit or deny the allegations and, therefore, Defendant denies them.

5. Answering the allegations of paragraph 5 of the Complaint, Defendant admits that it issued a commercial general liability policy, policy number 585BW03318, to Big Sky Entertainment III, LLC dba the Blue Tattoo (San Jose), for the policy period of June 27, 2004 to June 27, 2005 (hereinafter, the "Policy"). Defendant denies all remaining allegations.

6. Answering the allegations of paragraph 6 of the Complaint, Defendant denies the allegations therein.

7. Answering the allegations of paragraph 7 of the Complaint, Defendant lacks sufficient information to admit or deny these allegations and, therefore, Defendant denies them.

8. Answering the allegations of paragraph 8 of the Complaint, Defendant admits the allegations therein.

9. Answering the allegations of paragraph 9, Defendant admits that it has denied coverage of Plaintiff's claim pursuant to the terms of the Policy. Defendant denies all remaining allegations.

10. Answering the allegations of paragraph 10 of the Complaint, Defendant admits the allegations therein.

11. Answering the allegations of paragraph 11 of the Complaint,

1 Defendant denies the allegations therein.

2 12. Answering the allegation of paragraph 12 of the Complaint,
3 Defendant admits the allegation therein.

4
5 WHEREFORE, Defendant prays as follows: (1) that judgment be entered in
6 its favor; (2) that Plaintiff takes nothing by way of its Complaint; (3) that
7 Defendant be awarded its attorneys' fees and costs as allowed by law; and (4) that
8 Court grants such other relief as it may deem just and proper.

9
10 Dated: February 8, 2007

WESTON & McELVAIN LLP

11
12
13 By: 

14 Richard C. Weston
15 Richard C. Rey II
16 Attorneys for Defendant THE
17 BURLINGTON INSURANCE COMPANY
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Exhibit 3 Page 18

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 888 West Sixth Street, 15th Floor, Los Angeles, California 90017.

On February 8, 2007, I served the foregoing document described as: **THE BURLINGTON INSURANCE COMPANY'S ANSWER TO COMPLAINT** by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

David Craft
Attorney at Law
181 Devine Street
San Jose, CA 95110
Counsel for Plaintiff

Phone: (408) 293-6193
Fax: (408) 275-0412

☒ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (BY FACSIMILE) I sent such document from facsimile machine (213) 596-8039 on February 8, 2007. I certify that said transmission was completed and that all pages were received and that a report was generated by facsimile machine (213) 596-8039 which confirms said transmission and receipt. I, thereafter, mailed a copy to the interested party(ies) in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed to the parties listed on the attached service list.

Executed on February 8, 2007 at Los Angeles, California.

☒ (Federal) I declare under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


MELINDA C. MONTERO

EXHIBIT 4

1 **WESTON & McELVAIN LLP**
2 RICHARD C. WESTON, Bar #126491
3 RICHARD C. REY II, Bar #193212
4 888 West Sixth Street, 15th Floor
5 Los Angeles, California 90017
6 Telephone: (213) 596-8000
7 Facsimile: (213) 596-8039
8 E-mail: rweston@wmattorneys.com
9 rrey@wmattorneys.com

10 Attorneys for Defendant
11 THE BURLINGTON INSURANCE COMPANY

12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15 JENNY WOLFES,

16 Plaintiffs,

17 vs.

18 BURLINGTON INSURANCE
19 COMPANY AND DOES 1 to 25,
20 Inclusive,

21 Defendants.

22 CASE NO. C07 00696 RMW (PVTx)

23 **NOTICE OF PRETRIAL DATES
24 AND PROCEDURES SET BY THE
25 COURT**

26 Exhibit 4 Page 20

1 TO PLAINTIFF AND HER COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on April 27, 2007, the above-referenced
3 Court conducted a Case Management Conference and set forth the following pre-
4 trial dates and procedures:

- 5 1. **Written Discovery:** The last day to complete written
6 discovery shall be on July 1, 2007. The parties shall be
7 permitted to propound an unlimited amount of document
8 requests, but may propound no more than 10 interrogatories
9 each;
- 10 2. **Depositions:** The last day to complete depositions shall be on
11 September 15, 2007. Each side shall be permitted 25 hours of
12 deposition questioning;
- 13 3. **Initial Expert Disclosures:** August 17, 2007;
- 14 4. **Counter / Supplemental Expert Disclosures:** August 31,
15 2007;
- 16 5. **Motion Hearing Cut-off:** October 26, 2007; and,
- 17 6. **Second Case Management Conference:** October 26, 2007 @
18 10:30 a.m.

19
20
21 Dated: May 2, 2007

WESTON & McELVAIN LLP

22
23
24 By: 

25 Richard C. Rey II
26 Attorneys for Defendant THE
27 BURLINGTON INSURANCE COMPANY
28

Exhibit 4 Page 21

Notices

5:07-cv-00696-RMW Wolfes v. Burlington Insurance Company

U.S. District Court
Northern District of California
Notice of Electronic Filing or Other Case Activity

NOTE: Please read this entire notice before calling the Help Desk. If you have questions, please email the Help Desk by replying to this message; include your question or comment along with the original text.

Please note that these Notices are sent for all cases in the system when any case activity occurs, regardless of whether the case is designated for e-filing or not, or whether the activity is the filing of an electronic document or not.

If there are **two** hyperlinks below, the first will lead to the docket and the second will lead to an e-filed document.

If there is no second hyperlink, there is no electronic document available .

See the FAQ posting 'I have a Notice of Electronic Filing that was e-mailed to me but there's no hyperlink...' on the ECF home page at for more information.

The following transaction was received from Rey, Richard Charles entered on 5/2/2007 at 11:25 AM and filed on 5/2/2007

Case Name: Wolfes v. Burlington Insurance Company
Case Number: 5:07-cv-696
Filer: Burlington Insurance Company
Document Number: 19

Docket Text:

NOTICE by Burlington Insurance Company of *Pretrial Dates and Procedures Set by The Court* (Rey, Richard) (Filed on 5/2/2007)

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:C:\Documents and Settings\mmontero\Desktop\PDF\2007 05 02 IFG091 Ntc of Pretrial Dates.pdf

Electronic document Stamp:

[STAMP CANDStamp_ID=977336130 [Date=5/2/2007] [FileNumber=3413941-0] [25834a603d5a3bc1c1ce04aa9e8db65e9ad517c752d420f3e0f58022c6a4b195db366a a62ad22c3ff34629b9f4750afc831149b259b503c262ec0cebf4c4ba5c]]

5:07-cv-696 Notice will be electronically mailed to:

David Kraft DKraft6885@aol.com

Richard Charles Rey , II rrey@wmattorneys.com, mmontero@wmattorneys.com

Exhibit 4 Page 22

Richard C. Weston rweston@wmattorneys.com, kjimenez@wmattorneys.com

5:07-cv-696 Notice will be delivered by other means to:

Exhibit 4 Page 23

EXHIBIT 5

Gerald A. Emanuel (SBN 61049)
HINKLE, JACHIMOWICZ, POINTER & EMANUEL
2007 West Hedding Street, Suite 100
San Jose, CA 95128
Telephone: (408) 246-5500
Facsimile: (408) 246-1051

Attorneys for Plaintiff
JENNY WOLFES

ADR

ORIGINAL
FILED

10 PM 2:29

RICHARD W. WICKING
U.S. DISTRICT COURT
SAN JOSE, CALIF.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

C07

Case No.

04657

PVT

JENNY WOLFES,

Plaintiff,

vs.

BURLINGTON INSURANCE COMPANY)
AND DOES 1 to 25, inclusive,)

Defendants.)

COMPLAINT FOR BREACH OF
CONTRACT, BREACH OF COVEN-
ANT OF GOOD FAITH AND FAIR
DEALING, INTENTIONAL INFLIC-
TION OF EMOTIONAL DISTRESS,
NEGLIGENT INFLICTION OF
EMOTIONAL DISTRESS

Comes now Plaintiff and alleges:

1. Jenny Wolfes ("Wolfes") is an individual and at all times relevant to this action, was and is a resident of Santa Clara County, California.

2. Defendant Burlington Insurance Company (hereinafter Burlington) is, and at all times herein mentioned is a foreign insurer existing under the laws of the state of North Carolina. Plaintiff is informed and believes and thereon alleges that Burlington does business in the state of California by issuing and delivering policies of insurances to residents of the state of California through surplus lines brokers pursuant to Insurance Code Section 1760, et. seq. All acts alleged herein occurred in the State of California and Plaintiff brings this matter

subject to the laws of the State of California.

3. Plaintiff has no knowledge of the true names and capacities of Defendants sued herein as DOES 1 through 25, inclusive, except that Plaintiff is informed and believes, and upon such information and belief alleges, that each of the fictitiously named Defendants is responsible in some manner for the occurrences alleged in this Complaint and/or is legally responsible for the wrongful acts alleged herein. Plaintiff therefore sues these Defendants by such fictitious names and will amend this Complaint to allege their true names and capacities when ascertained. Said DOE Defendants, and each of them, are collectively included in the reference to Defendants.

4. Plaintiff is informed and believes, and upon such information and belief alleges, that at all times herein mentioned each of the Defendants was the agent and employee of each of the remaining Defendants, and in doing the things alleged below, was acting within the scope of such agency, and that the Defendants have ratified their conduct.

5. In or about June 27, 2004, Defendant Burlington for valuable consideration issued a commercial general liability insurance policy, number 585BW03318, to Big Sky Entertainment III, Inc., hereinafter referred to as the "policy" covering relevant periods during 2004.

6. Plaintiff Jenny Wolfes was at all times mentioned an officer, director, shareholder and employee of Big Sky Entertainment III, Inc., hereinafter referred to as "BSE III". Plaintiff is an insured under the Policy for liabilities covered by the policy arising out of Plaintiff's activities as an officer, director, shareholder and employee of BSE III.

7. The Policy provides, as set forth below:

A. The "Personal Injury" and "Advertising Injury" Insurance Agreement provides:

1. Insuring Agreement.

“a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal injury” or “advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against any suit seeking those damages.”

“b. This insurance applies to “Personal and Advertising injury” caused by an offense arising out of your business but only if the offense was committed in the coverage territory during the policy period.”

B. The definition of Personal and Advertising provide:

“d. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.”

8. On or about June 27, 2004 and while the policy was in full force and effect, Wolfes was served with a law suit filed in Santa Clara County Superior Court, Number 104CV025291 entitled Big Sky Entertainment, III, Inc., individually and dba The Blue Tattoo, James Edward Pope, William G. Leunis III, Robert Simpson vs. Jenny Wolfes. On September 20, 2005, Wolfes was served with a First Amended Cross-Complaint filed in the same action entitled William G. Leunis III vs. Jenny Wolfes. On October 20, 2006, Wolfes was served with the Second Amended Cross-Complaint filed in the same action entitled William G. Leunis III vs. Jenny Wolfes hereinafter referred to as the underlying action.

9. The complaint in underlying action alleges that Plaintiff made telephone calls to interfere with the sale of the assets of BSE III. The complaint also alleges that Plaintiff took actions that were disruptive of the sale by making accusations about the building and the property. The complaint, inter alia, seeks damages arising from the alleged actions of Plaintiff in making statements and accusations, which interfered with the sale and were disruptive of the sale.

10. On October 20, 2005, July 18, 2006, and November 13, 2006 Wolfes tendered to Burlington the complaint and cross-complaint and demanded that pursuant to the policy, Burlington provide a defense on behalf of Wolfes and indemnify her with respect to the complaint and cross-complaint. Defendants subsequently acknowledged the receipt of the tender of the defense.

11. Plaintiff is informed and believes and thereon alleges that Burlington failed to conduct a proper, full and complete investigation of the facts and circumstances giving rise to the claims asserting in the underlining action. Subsequently, Burlington denies the tender of the defense.

12. Plaintiff is informed and believes and thereon alleges that Burlington failed and refused to:

- A. Conduct a prompt, full and complete investigation of the claim in addition to those matters alleged in the complaint.
- B. Defend their insured from the claims asserted in the underlying action.
- C. Indemnify their insured from the claims asserted in the underlying action
- D. Conduct any investigating after they rejected the tender of defense into the circumstances surrounding the claims asserted in the underling action.

13. The facts alleged in the underlying action and the information that was available to Burlington at the time of the tender revealed:

- A. That there was a potential for liability under the "Personal injury and Advertising injury" coverage in that it is claimed that Plaintiff made telephone calls to interfere with the sale of the assets of BSE III, and that she made accusations which disrupted the sale. That the plaintiffs in the underlying action claimed damages as a result of the

statements and accusations made by Plaintiff and sought to enjoin and restrain Plaintiff from making further statements and accusations.

14. Plaintiff has performed all of her obligations under the contract identified above, except for those obligations which because of the breach by BURLINGTON, of its obligations, Plaintiff has been excused or prevented from performing.

FOR A FIRST AND SEPARATE ACTION

(For Breach of Contract)

As and for a separate and distinct FIRST CAUSE OF ACTION, Plaintiff complains against defendant BURLINGTON, and alleges:

15. Plaintiff realleges and incorporates by reference each and every allegation of paragraphs 1 through 14 herein.

16. Plaintiff is informed and believes that BURLINGTON breached its obligations under the policy in the following manner:

A. By delaying in making any determination under all potential applicable coverage as to whether or not any defense was owed by BURLINGTON, or any of them, to the plaintiffs for the claims arising out of the underlying action;

B. By failing to conduct a full and complete investigation into the facts and circumstances of the claims asserted against Plaintiff in the underlying action;

C. By failing and refusing to defend Plaintiff from the claims asserted in the underlying action; and,

D. By failing and refusing to indemnify Plaintiff from the claims asserted in the underlying action; and,

E. By doing each of the acts or omissions alleged in paragraph 12.

17. Plaintiff is informed and believes that BURLINGTON failed and refused to conduct an investigation into the facts and circumstances of the claims asserted against Plaintiff and to provide a defense for her in the underling action. As a result of the breach of contract by BURLINGTON Plaintiff has been damaged, injured and prejudiced. Plaintiff was required to retain counsel to defend herself against the claims asserted against her.

18. As a result of the failure and refusal of BURLINGTON to conduct an investigation and defend Plaintiff, BURLINGTON is estoppded from relying on any subsequently discovered information to support its rejection of Plaintiff's tender of her defense in the underlying action.

19. As a direct and proximate cause of the breach of contract by BURLINGTON of its obligations under the policy Plaintiff has been damages as follows:

A. Plaintiff has been required to retain attorneys and to pay attorney's fees to defend her from the claims in the underling action all in an amount to be proven at trial;

B. General damages in an amount to be proven at trial

20. Plaintiff is informed and believes and thereon alleges that the denial of benefits, as alleged in this complaint, was vexatious and without cause. Pursuant to Insurance Code Section 1619, Plaintiff is entitled to reasonable attorney fees incurred in prosecution this action in an amount to be proven at time of trial

WHEREFORE, Plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

FOR A SECOND AND SEPARATE ACTION

(For Breach of the Covenant of Good Faith and Fair Dealing)

As and for a separate and distinct FIRST CAUSE OF ACTION, Plaintiff complains against defendant BURLINGTON, and alleges:

21. Plaintiff realleges and incorporates by reference each and every allegation of paragraphs 1 through 20 herein.

22. At all times herein relevant, said BURLINGTON agreed to act in good faith and deal fairly with Plaintiff when it entered into the policy and accepted premiums from Plaintiff. BURLINGTON thereby assumed a special relationship with, and fiduciary obligation to Plaintiff, and agreed to abide by its said duties. Nevertheless, BURLINGTON refused and failed to act in good faith and deal fairly with Plaintiff, and breached said obligations, as is set forth more particularly below.

23. Plaintiff is informed and believes and thereon alleges that BURLINGTON breached the implied covenant of good faith and fair dealing arising out of the policy, in the following respects:

A. By failing to conduct a full and complete investigation into the facts and circumstances of the claims asserted against plaintiff in the underlying action;

B. By unreasonably and narrowly interpreting the policy in manner calculated to deny benefits due Plaintiff under the policy, including refusing to consider or distinguish cited authority which holds that the allegations in the underlying action triggered a duty by BURLINGTON to defend Plaintiff.

C. Burlington unreasonably refused to pay for the cost of the defense in the underling action.

D. BURLINGTON conspired with the William Leunis, plaintiff in the underlying action, in developing a strategy to increase Plaintiff's attorney's fees in

order gain an unfair advantage, to decrease Leunis' liability, and to dissuade Plaintiff from seeking benefits due her under the policy by unreasonably opposing Plaintiff's motions, all calculated to increase Plaintiff's attorney fees.

E. BURLINGTON conspired with William Leunis, plaintiff in the underlying action, in developing a strategy to increase Plaintiff's attorney's fees and to decrease the potential liability in order to gain an unfair advantage, to decrease Leunis' liability and dissuade Plaintiff from seeking benefits due her under the policy by refusing to negotiate in good faith with Plaintiff.

24. The denial of benefits claimed by Plaintiff under the policy was done by BURLINGTON without reasonable cause. BURLINGTON knew that a duty to defend was owed to Plaintiff, yet refused to provide a defense. As a direct and proximate result of the unreasonable conduct of BURLINGTON Plaintiff has been required to retain attorneys and to pay attorney's fees to obtain benefits due her under the policy. Plaintiff has suffered emotional distress as a result of the conduct of BURLINGTON.

25. As a result of the tortuous conduct of BURLINGTON, Plaintiff was damaged and injured. Plaintiff is therefore, entitled to recover:

1. Reasonable attorneys fees incurred by Plaintiff in obtaining policy benefits in an amount to be proved at time of trial;
2. Plaintiff is entitled to an award of general damages as compensation for her emotional distress in an amount that is to be proved at the time of trial; and
3. Reasonable attorney's fees incurred by Plaintiff in defending the underlying action.

26. Plaintiff is informed and believes and thereon alleges that BURLINGTON

intentionally engaged in a course of conduct, which was intended to oppress Plaintiff and to dissuade Plaintiff and her from seeking benefits due to the plaintiff under the policy. The aforementioned acts of Burlington were willful, wanton, malicious and oppressive, and justify an award of exemplary and punitive damages in an amount not yet ascertainable.

27. BURLINGTON continues to engage in the aforementioned acts, and said conduct and bad faith constitutes a continuing tort and continuing bad faith to Plaintiff causing Plaintiff continuing damage as described herein beyond the date of filing of this action.

WHEREFORE, Plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

FOR A THIRD AND SEPARATE ACTION

(Intentional Infliction of Emotional Distress)

As and for a separate and distinct third CAUSE OF ACTION, Plaintiff complains against defendant BURLINGTON and alleges:

28. Plaintiff realleges and incorporates by reference each and every allegation of paragraphs 1 through 27 herein.

29. In so doing, BURLINGTON pursued an outrageous course of conduct, intentionally and/or recklessly, proximately causing Plaintiff severe emotional distress, shock and other highly unpleasant emotions.

30. As a further direct and proximate result of the aforementioned conduct of BURLINGTON, Plaintiff has suffered mental and emotional distress, including but not limited to frustration, depression, nervousness and anxiety and has thereby incurred general damages in a sum to be determined according to proof at time of trial.

31. As a further direct and proximate result of the aforementioned conduct of

BURLINGTON, Plaintiff has been obliged to expend or incur liability for costs of suit, attorney fees and related expenses in an amount not yet fully ascertained, but which will be submitted at the time of trial.

32. As a further direct and proximate result of the aforementioned conduct of BURLINGTON, Plaintiff has suffered special damages in an amount according to proof at the time of trial from the lack of availability of said sums to him.

33. The conduct of BURLINGTON as described herein was done willfully, oppressively, maliciously, with conscious disregard of the rights of Plaintiff, and with the intent to annoy, harass or injure Plaintiff such that Plaintiff is entitled to a recovery of exemplary damages.

WHEREFORE, Plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

FOR A FOURTH AND SEPARATE CAUSE OF ACTION

(Negligent Infliction of Emotional Distress)

As and for a separate and distinct FOURTH CAUSE OF ACTION, Plaintiff complains against BURLINGTON, and alleges:

34. Plaintiff realleges and incorporates by reference each and every allegation of paragraphs 1 through 33 herein.

35. At all times herein mentioned, it was foreseeable to BURLINGTON that as a proximate result of its conduct as alleged herein, Plaintiff would be caused to suffer severe emotional distress, shock and other highly unpleasant emotions.

36. As a direct and proximate result of the aforementioned conduct of BURLINGTON, Plaintiff has suffered mental and emotional distress, including but not

limited to frustration, depression, nervousness and anxiety and has thereby incurred general damages in a sum to be determined according to proof at time of trial.

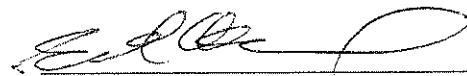
37. As a further direct and proximate result of the aforementioned conduct of BURLINGTON, Plaintiff has been obliged to expend or incur liability for costs of suit, attorney fees and related expenses in an amount not yet fully ascertained, but which will be submitted at the time of trial.

38. As a further direct and proximate result of the aforementioned conduct of defendant BURLINGTON, Plaintiff has suffered special damages in an amount according to proof at the time of trial from the lack of availability of said sums to him.

WHEREFORE, Plaintiff prays judgment against BURLINGTON as follows:

1. For general, special and consequential damages according to proof;
2. For exemplary damages according to proof;
3. For reasonable attorney's fees and costs and related expenses of litigation, according to proof;
4. For reasonable attorney fees and costs and related of litigation expenses incurred in the defense of underling action
5. For interest according to proof; and
6. For such other and further relief as the court deems proper.

Dated: 9-10-07



GERALD A. EMANUEL
Attorney for Plaintiff

PROOF OF SERVICE

Jenny Wolfes v. Burlington Insurance Company
USDC, Northern District Case No.C07 04657 JW

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 888 West Sixth Street, 15th Floor, Los Angeles, California 90017.

On November 7, 2007, I served the foregoing document described as: **DEFENDANT BURLINGTON INSURANCE COMPANY'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ITS MOTION TO DISMISS** on all parties as indicated below:

Gerald Emanuel
HINKLE, JACHIMOWICZ, POINTER & EMANUEL
2007 West Hedding Street, Suite 100
San Jose, CA 95128
Telephone: (408) 246-5500
Facsimile: (408) 246-1051

☒ by placing the true copies thereof enclosed in sealed envelopes addressed as stated above.

☒ **BY MAIL** as follows: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

☐ **BY FACSIMILE** I sent such document from facsimile machine (213) 596-8039 on November 7, 2007. I certify that said transmission was completed and that all pages were received and that a report was generated by facsimile machine (213) 596-8039 which confirms said transmission and receipt. I, thereafter, mailed a copy to the interested party(ies) in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed to the parties listed on the attached service list.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on **November 7, 2007**, at Los Angeles, California


Patricia De La Cruz